A

RUSMAN SULAIMAN

v.

PP

B

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
ZULKEFLI MAKINUDIN CJ (MALAYA)
ABDULL HAMID EMBONG FCJ
SURIYADI HALIM OMAR FCJ
C HASAN LAH FCJ
[CRIMINAL APPEAL NO: 05-62-2011(B)]
4 MAY 2012

D ***CRIMINAL LAW:*** *Penal Code - Section 302 - Murder - Conviction and sentence - Appeal against - Deceased found strangled in burning hotel room - Whether appellant's presence at scene of murder established - Whether evidence connected appellant to crime - Intention to cause bodily injury - Whether proved - Whether appellant's acts fell under s. 300(b) or (c) Penal Code - Whether appellant committed culpable homicide* E *amounting to murder - Prima facie case - Whether established - Whether reasonable doubt arose in prosecution's case*

F The appellant was charged under s. 302 of the Penal Code for the murder of his lover, Sheeren Liao Ee Chian ('the deceased') on 3 February 2002, at 11am, in room 321 at Hotel Panmour Villa ('room 321'). The brief case of the prosecution was that the appellant had strangled the deceased with a towel, had forcefully covered her mouth causing her to fall into a deep coma and had allegedly splashed petrol all over the room and started a fire. After G the appellant left the hotel premises, the fire alarm was triggered and SP8, a hotel employee and neutral witness, had gone up to room 321 where he saw smoke seeping out of the door. With the help of the hotel workers, the fire was extinguished. The deceased was discovered on the bed, covered with soot. There were also signs of burnt marks on her legs and hands. A blue Helix petrol H container ('P3') and some cigarette butts ('P23A') were some of the items discovered. SP12, the chemist who prepared the chemist report evinced that the DNA profile from the cigarette butt (P23A), the semen from the cotton swab (J1 and J2) (from rectal and vaginal swab for spermatozoa) and the blood sample I came from the same source *ie*, the appellant, thus establishing the

presence of the appellant in the said room at the time of the murder. The learned judge concluded that a *prima facie* case had been established against the appellant and called for his defence. The appellant's only serious defence was his allegation that his wife ('SP5') had caused the death of the deceased. According to the appellant, SP5 had come to the hotel and had gotten into a heated argument with the appellant and the deceased. The appellant testified that he was supposed to have left the hotel simultaneously with SP5 but had instead gone to a pharmacy to buy some medicine. The appellant further testified that he had received a call from SP5 to return to room 321. According to the appellant, he had returned to the room and it was SP5 who opened the door. Inside the room, he saw the deceased on the floor. He further testified that SP5 had told him that the deceased was dead and the body had to be disposed of. However, SP5 denied any involvement in the murder of the deceased and claimed that she was not in the vicinity of the hotel on the mentioned date. At the end of the trial, the learned judge found the appellant guilty of the charge and accordingly sentenced him to death. The Court of Appeal affirmed the decision, causing the appellant to file an appeal to this court.

Held (dismissing appeal)
Per Suriyadi Halim Omar FCJ delivering the judgment of the court:

(1) It is accepted by the courts that bodily fluid, tissues, semen, saliva etc obtained from the crime scene may be established to connect an accused person to the crime. The DNA profile on the cigarette butt (P23A), picked up nearby to room 321, and which matched the DNA of the semen from the cotton swab, confirmed to match that of the appellant, confirmed his presence in that room before the deceased's death. The prosecution had also established that the semen on the vagina of the deceased was that of the appellant which confirmed their sexual relationship. SP34, who headed the forensics team, had found four other cigarette butts but had picked up only two (P23B) for DNA profiling. This issue of having picked up only two out of the four cigarette butts was a substantive ground of appeal by the appellant, as he canvassed that the non-recovery of the other two cigarette butts should be held against the prosecution. However, in the current appeal, even

A without the cigarette butts, there was an abundance of evidence to establish the appellant's presence at the scene of the murder. The cigarette butt (P23A) and the Helix container (P3) were at best corroborative evidence. (paras 12, 13 & 27)

B **(2)** The testimony of the pathological forensic expert ('SP28') and her medical report, showed that prior to the deceased's death, there were clear signs of strangulation, possibly with a towel and forceful closure of her mouth, physical acts that led to the flow of blood supply to the airway being cut off. The cause C of death was attributable to asphyxia with acute pulmonary oedema as a consequence of the suffocation (with fire-related death). The minimal soot lining at the upper airways, which must have come from the smoke, meant that she was still alive when the fire was lighted. The smoke merely hastened her D death. (para 31)

(3) The appellant must have known that by strangling the neck of the deceased with a towel or even covering her mouth with a pillow (ingredient of intention of causing such bodily injury), E the deceased would suffocate and die (ingredient which was likely to cause death of the deceased). The intention to cause that bodily injury could be read from the nature and seriousness of the injuries caused. Herein, the injuries were multiple and inflicted on vital areas with great force, causing F the deceased to suffer asphyxia and falling into deep coma inevitably leading to slow death. The act of burning the room (which would get rid of the body, was the *coup de grace*, as death to the deceased was a certainty, let alone disfigurement beyond recognition) was sufficient to establish the required G statutory intention. (paras 33 & 34)

(4) Even though ss. 299 and 300 of the Penal Code equally contemplated death, the scenario here was that the degree of risk to death was past that of being the likely result but the most probable result, and the appellant knew death would H ensue (the subjective ingredient). The violent acts of the appellant therefore would fall squarely under s. 300(b) or (c) of the Penal Code, in that the prosecution had established that the appellant had committed culpable homicide amounting to murder. Even though the prosecution depended very much I on circumstantial evidence, it had successfully adduced

sufficient evidence through witnesses' testimony and physical evidence (exhibits) collected in the course of the police investigation. The prosecution had established that the appellant had met the deceased at the hotel and had a sexual liaison there, and with the benefit of being the last person to be with her, had strangled the deceased, and later started a fire in the room. The strangulation, asphyxia and manner of her death were confirmed by SP28. A *prima facie* case had thus been established. (paras 35 & 36)

(5) The appellant's attempt to blame SP5 for the murder of the deceased had come out rather weakly since he never posed any question at the prosecution stage that could have implicated SP5 directly to the murder. There was no evidence adduced by the appellant as to how SP5 could have had access to room 321, in light of there being only one key for it. This made the appellant's story of SP5 waiting in room 321 rather far-fetched. It was uncontroverted that SP5 had testified that she had handed over the petrol to him (the Helix container, P3) in a shop called Syarikat Dragon Sound, located outside the hotel, and hence never entered the hotel. According to SP5, the appellant's car had run dry and she had helped purchase some petrol for him. At no stage of his evidence did the appellant manage to rebut the prosecution's evidence that he was the last person to see the deceased alive, in light of the damning evidence of SP8 who established that the deceased had checked into room 321, that the appellant was present at that hotel on the day of the deceased's death, that the appellant had informed SP8 he was from room 321 and handed over a burnt slot key on the counter while appearing nervous and in a hurry. (paras 26 & 39)

(6) The appellant's defence was further weakened when he failed to stand rigorous probing. Twice, the appellant had admitted that he personally set the room on fire after SP5 had left the room. With his admission, it was beyond reasonable doubt that he was the last person to see the deceased alive. To allege that SP5 killed the deceased, on the premise that he saw the deceased on the floor followed by her supposed statement that the deceased was dead, or said he failed to

detect any pulse, simply could not stand the test of SP28's post-mortem finding. In light of the fact that the deceased died only after the fire, and by testifying that he found no pulse, the appellant had fallen into his own trap and exposed his capability to lie in court. Once the appellant's veracity became doubtful, his evidence must be scrutinised critically. Further, his admission that he had started the fire unwittingly destroyed any semblance of a possible defence. (paras 39 & 41)

(7) There was no error in the High Court's finding that the prosecution had established a case beyond reasonable doubt against the appellant (*Balachandran v. PP*). The appellant had failed to cast any reasonable doubt on the prosecution's case *ie*, the burden imposed on him (*Arulpragasan Sandaraju v. PP*). Thus, the finding of guilt, the conviction and mandatory sentence of death by hanging was affirmed. (para 42)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dituduh membunuh kekasihnya, Sheeren Liao Ee Chian ('si mati') di bawah s. 302 Kanun Keseksaan pada 3 Februari 2002, pukul 11 pagi, di bilik 321 Hotel Panmour Villa ('bilik 321'). Secara ringkas, kes pihak pendakwaan adalah bahawa perayu telah mencekik si mati dengan tuala, secara paksa menutup mulutnya menyebabkan si mati mengalami koma yang mendalam dan telah menyimbah petrol di seluruh bilik dan memulakan kebakaran. Selepas perayu meninggalkan premis hotel, penggera kebakaran tercetus dan SP8, seorang pekerja hotel dan saksi neutral, telah naik ke bilik 321 di mana beliau telah melihat asap meresap keluar dari pintu. Dengan bantuan pekerja-pekerja hotel yang lain, api telah berjaya dipadamkan. Si mati dijumpai di atas katil, ditutup dengan jelaga. Terdapat juga tanda-tanda melecur pada kaki dan tangan si mati. Satu bekas biru petrol Helix (P3) dan beberapa puntung rokok ('P23A') adalah antara beberapa item yang ditemui. SP12, ahli kimia yang menyediakan laporan kimia memberi keterangan bahawa profil DNA daripada puntung rokok (P23A), air mani dari swab kapas (J1 dan J2) (dari dubur dan faraj bagi spermatozoa) dan sampel darah adalah dari sumber yang sama iaitu perayu, dan ini mengesahkan kehadiran perayu di dalam bilik tersebut pada masa pembunuhan. Yang arif hakim membuat kesimpulan bahawa satu kes *prima facie* telah dibuktikan terhadap

perayu dan dia telah dipanggil untuk membela diri. Satu-satunya pembelaan perayu adalah dakwaannya bahawa isteri perayu ('SP5') telah menyebabkan kematian si mati. Menurut perayu, SP5 telah mengunjungi hotel itu, dan telah berlaku pertengkaran hebat di antara SP5, perayu dan si mati. Perayu memberi keterangan bahawa dia sepatutnya meninggalkan hotel itu bersama-sama SP5 tetapi telah pergi ke farmasi untuk membeli ubat. Perayu memberi keterangan bahawa dia telah menerima panggilan daripada SP5 mengarahkannya kembali ke bilik 321. Menurut perayu, dia kembali ke bilik tersebut dan SP5 yang telah membuka pintu. Di dalam bilik itu, perayu melihat si mati terbaring di atas lantai. Perayu memberi keterangan lanjut bahawa SP5 telah memberitahunya bahawa si mati sudah pun meninggal dunia dan mayatnya harus dilupuskan. Walau bagaimanapun, SP5 menafikan sebarang penglibatan di dalam pembunuhan si mati dan mendakwa bahawa dia tidak berada di sekitar kawasan hotel itu pada tarikh tersebut. Di akhir kes perbicaraan, yang arif hakim mendapati bahawa perayu bersalah dan menjatuhkan hukuman mati ke atasnya. Mahkamah Rayuan mengesahkan hukuman tersebut, menyebabkan perayu memfailkan rayuan di mahkamah ini.

Diputuskan (menolak rayuan)
Oleh Suriyadi Halim Omar HMP menyampaikan penghakiman mahkamah:

(1) Ia diterima oleh mahkamah bahawa cecair badan, tisu, air mani dan air liur yang diperolehi dari tempat kejadian boleh dibuktikan untuk mengaitkan tertuduh dengan jenayah itu. Profil DNA yang terdapat pada puntung rokok (P23A), yang ditemui berdekatan dengan bilik 321, berpadanan dengan DNA air mani daripada swab kapas, yang disahkan berpadanan dengan perayu, mengesahkan kehadiran perayu di dalam bilik tersebut sebelum kematian si mati. Pihak pendakwaan telah membuktikan bahawa air mani yang terdapat pada faraj si mati adalah berpadanan dengan perayu yang mengesahkan hubungan seksual mereka. SP34, yang mengetuai pasukan forensik, telah mendapati empat lagi puntung rokok tetapi hanya telah mengambil dua (P23B) untuk pemprofilan DNA. Isu mengambil dua daripada empat puntung rokok adalah alasan substantif rayuan oleh perayu, di mana dia berhujah bahawa pihak pendakwaan harus menjawab mengenai

kegagalan mengambil dua puntung rokok yang lain itu. Walau bagaimanapun, di dalam rayuan ini, walaupun tanpa puntung-puntung rokok itu, terdapat beberapa keterangan untuk membuktikan kehadiran perayu di tempat kejadian pembunuhan itu. Puntung rokok (P23A) dan bekas Helix (P3) adalah sekurang-kurangnya keterangan sokongan sahaja.

(2) Testimoni pakar patologi forensik, SP28, dan laporan perubatannya menunjukkan bahawa sebelum kematian si mati, terdapat kesan-kesan jelas dicekik, mungkin dengan tuala dan penutupan mulutnya secara paksa, tindakan-tindakan fizikal yang membawa kepada aliran bekalan darah yang terputus. Punca kematian adalah asfiksia dengan edema pulmonari akut akibat kelemasan (dengan kematian berkaitan kebakaran). Jelaga minimum yang terdapat pada saluran pernafasan atasan, yang mesti datangnya dari asap, bermakna si mati masih hidup semasa api dinyalakan. Asap itu hanya telah mempercepatkan kematiannya.

(3) Perayu semestinya mengetahui bahawa dengan mencekik leher si mati dengan tuala atau menutup mulutnya dengan bantal (intipati niat menyebabkan kecederaan), si mati akan lemas dan meninggal dunia (intipati yang mungkin menyebabkan kematian si mati). Niat menyebabkan kecederaan boleh dibaca daripada sifat dan keseriusan kecederaan. Di sini, pelbagai kecederaan telah dikenakan ke bahagian penting secara paksaan, menyebabkan si mati mengalami asfiksia dan berada di dalam keadaan koma mendalam yang membawa kepada kematian secara perlahan. Tindakan membakar bilik (yang akan melupuskan mayat, adalah tamparan maut, kerana kematian kepada si mati adalah pasti, apatah lagi kecacatan akan membuatkan mayat tidak dapat dikenali) adalah memadai untuk membuktikan niat statutori yang diperlukan.

(4) Walaupun ss. 299 dan 300 Kanun Keseksaan menimbangkan kematian, keadaan di sini adalah bahawa tahap risiko kepada kematian melebihi akibat yang mungkin berlaku dan menjadi akibat yang paling mungkin berlaku, dan perayu tahu kematian akan berlaku (intipati subjektif). Oleh itu, tindakan ganas perayu terangkum di bawah s. 300(b) atau (c) Kanun Keseksaan, di mana pihak pendakwaan telah membuktikan bahawa perayu telah melakukan homisid salah berjumlah kepada pembunuhan.

Walaupun pihak pendakwaan bergantung kepada keterangan mengikut keadaan, ia telah berjaya mengemukakan keterangan mencukupi melalui testimoni dan keterangan fizikal saksi-saksi (ekshibit-ekshibit) yang dikumpul semasa siasatan polis dijalankan. Pihak pendakwaan telah membuktikan bahawa perayu berjumpa dengan si mati di hotel tersebut dan melakukan hubungan seksual, dan perayu adalah orang terakhir bersama dengan si mati dan telah mencekik si mati, dan kemudiannya membakar bilik itu. Tindakan mencekik, asfiksia dan cara si mati telah meninggal dunia telah disahkan oleh SP8. Dengan itu, satu kes *prima facie* telah pun dibuktikan.

(5) Usaha perayu menyalahkan SP5 bagi pembunuhan si mati adalah lemah kerana pada peringkat pendakwaan, perayu gagal menimbulkan apa-apa soalan yang boleh melibatkan SP5 secara langsung dengan pembunuhan itu. Tiada keterangan yang dikemukakan oleh perayu berkenaan bagaimana SP5 mempunyai akses kepada bilik 321, kerana hanya ada satu kunci sahaja untuk bilik itu. Ini membuatkan cerita perayu mengenai SP5 menunggu di bilik 321 susah untuk dipercayai. SP5 memberi keterangan bahawa dia telah memberi petrol kepada perayu (bekas Helix, P3) di sebuah kedai bernama Syarikat Dragon Sound, yang bertempat di luar hotel, dan tidak memasuki hotel itu. Menurut SP5, kereta perayu telah kehabisan minyak dan SP5 telah menolong membelikan petrol untuk perayu. Perayu gagal menolak keterangan pihak pendakwaan bahawa perayu adalah orang terakhir melihat si mati semasa si mati masih hidup, berdasarkan keterangan-keterangan SP8, pekerja hotel, yang membuktikan bahawa si mati telah memasuki bilik 321, bahawa perayu berada di hotel itu pada hari si mati meninggal dunia, bahawa perayu telah memberitahu SP8 bahawa dia datang dari bilik 321 dan telah memberikan kunci slot terbakar ke kaunter dalam keadaan gementar dan tergesa-gesa.

(6) Pembelaan perayu seterusnya menunjukkan beberapa kelemahan apabila perayu gagal menjawab soalan yang diajukan secara bertubi-tubi. Perayu sebanyak dua kali telah mengaku bahawa dia telah membakar bilik tersebut selepas SP5 meninggalkan bilik tersebut. Dengan pengakuannya, ia adalah melampaui keraguan munasabah bahawa perayu adalah orang

terakhir melihat si mati semasa si mati masih hidup. Untuk mendakwa SP5 membunuh si mati, atas premis bahawa dia telah melihat si mati atas lantai diikuti dengan kenyataan SP5 kononnya si mati telah meninggal dunia, atau kenyataan perayu bahawa dia gagal mengesan sebarang nadi, tidak boleh melawan ujian bedah siasat yang dijalankan oleh SP28. Memandangkan bahawa si mati telah meninggal dunia selepas kebakaran berlaku, dan selepas memberi keterangan bahawa perayu gagal mengesan nadi, perayu telah jatuh ke dalam perangkap sendiri dan mendedahkan keupayaannya berbohong di mahkamah. Sekali kebenaran perayu diragui, keterangannya harus diteliti secara kritis. Seterusnya, pengakuan perayu bahawa dia telah memulakan kebakaran itu telah memusnahkan apa-apa yang berkemungkinan berupa pembelaan.

(7) Tiada kekhilafan berlaku dalam dapatan Mahkamah Tinggi bahawa pihak pendakwaan telah membuktikan kes melampaui keraguan munasabah terhadap perayu (*Balachandran v. PP*). Perayu telah gagal menimbulkan sebarang keraguan munasabah ke atas kes pendakwaan, iaitu, beban yang dikenakan ke atasnya (*Arulpragasan Sandaraju v. PP*). Dengan itu, dapatan bersalah, sabitan dan hukuman gantung sampai mati mandatori disahkan.

Case(s) referred to:

Abdul Aziz Lela v. PP [2011] 7 CLJ 1 CA ***(dist)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Chandmal & Anor v. State of Rajasthan AIR [1970] SC 917 ***(refd)***
Chung Kum Moey v. PP [1966] 1 LNS 39 PC ***(refd)***
Hanafi Mat Hassan v. PP [2006] 3 CLJ 269 CA ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Mohamed Ali v. PP [1962] 1 LNS 99 HC ***(refd)***
PP v. Hoo Chee Keong [1997] 2 CLJ (Supp) 357 HC ***(refd)***
PP v. Loo Seng Yip [2004] 8 CLJ 496 HC ***(refd)***
R v. Winner [1995] 79 A Crim R 528 ***(refd)***
Ranwilage Suren Sanjeewa Fernando v. PP [1998] 3 SLR(R) 269 ***(refd)***
Syed Abu Bakar Ahmad v. PP [1984] 1 CLJ 80; [1984] 1 CLJ (Rep) 368 FC ***(refd)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC ***(refd)***

Legislation referred to:
Penal Code, ss. 299, 300(b), (c), 302

For the appellant - M M Athimulan (MK Thas with him); M/s Athimulan & Co
For the respondent - Ahmad B Bache; AG's Chambers

[Editor's note: For the Court of Appeal judgment, please see Rusman Sulaiman lwn. PP [2011] 1 LNS 610].

Reported by Suhainah Wahiduddin

JUDGMENT

Suriyadi Halim Omar FCJ:

[1] The appellant was charged at the High Court for murder under s. 302 of the Penal Code and at the end of the trial was found guilty by the learned judge. He was accordingly sentenced to death. The Court of Appeal affirmed that decision thus causing the appellant to file an appeal to this court.

[2] The charge against the appellant is that he on 3 February 2002 at 11am in room 321 at Hotel Panmour Villa, 78, Leboh Turi, Off Persiaran Raja Muda Hassan, Taman Chi Liung, Klang, in the district of Klang, in the State of Negeri Selangor Darul Ehsan, had murdered Sheeren Liao Ee Chian ('the deceased'), under s. 302 of the Penal Code and punishable under the same section. The case of the prosecution was based on circumstantial evidence as no one saw the appellant committing the offence against the deceased. In order to be successful in its prosecution based on circumstantial evidence the chain of evidence must be so complete as to point unerringly to the guilt of the appellant (*Chandmal & Anor v. State of Rajasthan* AIR 1970 SC 917).

[3] The brief case of the prosecution was that the deceased and the appellant who were lovers met in room 321 at Hotel Panmour Villa. In the course of the meeting on 3 February 2002, the appellant strangled her with a towel and also forcefully covered her mouth, causing her to fall into deep coma and slowly dying. In order to cover his tracks and misdeeds, he splashed petrol all over the room, and started a fire. He then left the room, went

A downstairs to the payment counter, paid the bill of the room, returned the only key to the room, and left the hotel. Due to the smoke the death of the deceased was hastened. She died of asphyxia with acute pulmonary oedema due to suffocation (fire-related).

B

[4] We now reproduce the flow of evidence adduced by the prosecution that led to a finding of a *prima facie* case by the learned judge. Sophia binti Raymond Bartholome (SP4), a friend of the deceased, was called to establish that on 1 January 2002 C the latter had put up a night with her. The next day before leaving, the deceased informed her that she had been contacted by the appellant who wanted to meet her. Even though she had never met the appellant before SP4 knew of their relationship.

[5] SP8, a hotel employee testified that on 2 February 2002 the D deceased registered into room 321 of Hotel Panmour Villa. Only one room key was issued to her. SP8 likewise confirmed the presence of the appellant at that hotel. On 3 February 2002, at about 9.30am the latter paid in full the balance of room 321's bill to him. SP8 also testified that in the course of paying for the E room the appellant informed him that he was from room 321. Despite handing over a burnt slot key, the appellant never informed him of any fire, or that he had left a person in that room. The appellant had placed the burnt key slot on the counter. SP8 added that the appellant appeared nervous and in a hurry.

F

[6] SP8, who is a neutral witness established the connecting piece of evidence of the deceased having checked into room 321 of Hotel Panmour Villa a day before her death, and establishing the appellant's presence at that hotel on the day of her death. G The information supplied to SP8 by the appellant that he came from room 321 is additional evidence of his access to it before handing over the key. His silence regarding how the key was burnt, and the act of holding back an important piece of information of a person being left in the room, which turned out H to be the deceased, must be held against him. A dead body, let alone burnt beyond recognition, not only will cut off any link of the deceased to him but also destroy any evidence of physical affliction on the body.

I

[7] SP8's testimony of the appellant handing over a burnt slot key for that room, established the prosecution's case that the appellant had access, and was present in room 321, when it was in flames. His nervous disposition as observed by SP8 merely piled up the evidence against the appellant.

[8] SP8 completed the picture when he supplied additional evidence of what happened after the appellant left, in that at about 11am of the same morning, the fire alarm of the hotel was triggered. He went up to room 321 and saw smoke seeping out of the door. On opening the door he found fire about to engulf the room; he even noticed that the air condition had been dislodged and had fallen on the floor. But he did not see anyone in the room. With the help of workers he extinguished the fire. When he returned to his station the appellant was nowhere to be seen. The fire being on the third floor, and it being extinguished before the arrival of the fire brigade, was confirmed by SP7 the hotel manager.

[9] SP36, the investigating officer, testified that he arrived at about 1pm in the room and discovered the deceased on the bed. He saw the deceased being covered with soot and found signs of burn marks on her legs and hands. He testified that he was informed by a detective of the discovery of a blue Helix petrol container (P3) without its cap on, a red plastic bag (P3A) also near the lift, and the cap of the Helix container (P3B) at the stairs. SP36 directed that those exhibits be left untouched until the forensics team arrived.

[10] SP34 who headed the forensic team arrived at about 2.20pm. He, together with SP33 the photographer, made some preliminary observation of the area near the lift and the area leading to the door of room 321. He found outside the lift a red plastic bag (P3A) in which he found the abovementioned Helix (P3) container and a cigarette butt (P23A). At one of the steps near to the lift SP34 found a plastic bottle cover (P3B) that could fit P3. Not far from this cover he found four cigarette butts but picked up only two (P23B) for DNA profiling. The chemist found that the DNA profile of these two cigarette butts did not match the DNA of the appellant.

[11] This issue of having picked up only two out of the four cigarette butts by SP34 was a substantive ground of appeal by the appellant, as he canvassed that the non-recovery of the other two cigarette butts should be held against the prosecution. In support of his argument, learned counsel for the appellant cited the case of *Abdul Aziz Lela v. PP* [2011] 7 CLJ 1. The brief facts of that case are as follows:

> The appellant was found guilty, convicted and sentenced to death under s. 302 of the Penal Code by the High Court judge. His appeal to the Court of Appeal was successful whereupon the conviction was set aside and he was acquitted. The evidence showed that on 28.3.2003 the deceased did not return home. Her child, SP21 saw traces of blood on the deceased's car. The next day from information received, away from the house but next to a bonfire, the burnt body of the deceased was recovered by the police; apart from some other exhibits the police found 2 cigarette butts. The chemist testified that the DNA on the two cigarette butts was that of the appellant; that being so the appellant was at the scene of the crime. If not for the break in the chain of evidence of the exhibits, and the flaws in the investigation, the prosecution could have established conclusively his presence at the bonfire where the deceased was burnt. It was divulged that the police had recovered altogether 4 cigarette butts in the course of the investigation but only 3 were sent to the Chemist Department. Due to the failure to establish that the chain of evidence had not been broken, let alone why the fourth cigarette butt was not sent for DNA analysis, a relevant matter remained unanswered. There was thus no certainty that the 2 cigarette butts examined by the chemist supposedly carrying the DNA of the appellant came from the vicinity of the bonfire. Devoid of any other evidence, and with the 2 cigarette butts under scrutiny, the prosecution thus failed to establish the appellant's culpability hence his acquittal. Even though the prosecution filed an appeal against the Court of Appeal's decision that appeal was withdrawn eventually.

[12] It was the appellant's contention that had the two cigarette butts been recovered and profiled, there was a possibility of the presence of the appellant at the vicinity being uncertain, thus punching a hole in the prosecution's case. As there was no certainty as to whose cigarette butts they were, the appellant urged the court to consider the possibility of them not being his. After scrutinising the facts of *Abdul Aziz Lela v. PP (supra)*, and distinguishing them to the current case, we must reject the

argument that the non-recovery of the other two cigarette butts by SP34 or even SP36 would make any difference to the prosecution's case. In the above case, without the cigarette butts, as there was a dearth of evidence, the prosecution had failed to establish his presence at the crime scene.

[13] In the current appeal, even without the cigarette butts, there was an abundance of evidence to establish the appellant's presence at the scene of the murder. Put it in its proper perspective, with the prosecution establishing that the semen on the vagina of the deceased was that of the appellant, the prosecution had successfully established his presence in room 321 at the material time. The cigarette butt (P23A) and the Helix container (P3) were at best corroborative evidence.

[14] SP34 when walking through room 321 had detected the strong smell of petrol. Having seen the deceased's body and the room, SP34 discounted the possibility that she had deliberately hurt herself or had attempted suicide. He testified that the deceased had died before the fire took place. Regretfully we must state that as SP34's view was merely based on his visual assessment of the room *vis-à-vis* a medical conclusion made by a pathologist (P28), we cannot accept that opinion.

[15] We now supply our reasons why we prefer SP28's opinion. She was a pathological forensic expert working at Hospital Tengku Ampuan Rahimah, Klang when she performed the post mortem of the deceased. She holds an MBBS degree, a Diploma in Forensic Medicine from Glasgow University in 1995, a Masters in Forensic Medicine also from the same University, a Diploma in Medical Jurisprudence from the Society of Apothecaries London in 1996, and a post graduate Diploma in Forensic Anthropology from Bradford University in 2004. At the time of giving evidence she worked at Hospital Queen Elizabeth, Kota Kinabalu.

[16] Her expert report reads as follows:

> Postmortem examination revealed significant signs of asphyxia with associated acute pulmonary oedema resulting from a form of suffocation suffered by the deceased. In addition, there were evidence of a fire-related death as seen from the first degree burnt marks on the body with minimal soot lining of the upper airways ... In my opinion, the cause of death is attributable to asphyxia with acute pulmonary oedema as a consequence of the suffocation (with fire-related death) suffered by the deceased.

A Cause of death:

1. (a) Asphyxia with acute pulmonary oedema (due to)

(b) Suffocation (fire-related death).

B **[17]** She concluded that the deceased died of suffocation after the fire was started. In the course of the proceedings she also said the following:

> Contusions maksudnya ada kesan lebam pada otot leher yang dipanggil sternomastoid. Kesan lebam itu boleh disebabkan oleh
C tekanan objek yang tumpul. ...
>
> P11 dirujuk
>
> Jerutan dengan P11 berkemungkinan boleh sebabkan lebam pada otot sternomastoid dengan syarat ia adalah jerutan yang kuat. P11
D jika dijerut kuat boleh menghalang pengaliran darah-darah dan udara melalui saluran pernafasan dan seterusnya menyebabkan kelemasan. Kelemasan yang sebabkan pengurangan udara atau ketiadaan oksigen masuk ke badan simati boleh sebabkan kematian.
>
E Adanya lebam di bahagian dalam bibir adalah bersesuaian dengan keadaan bahawa simati telah ditekap dengan bantal. Ia boleh sebabkan asphyxia. Ia juga boleh sebabkan simati di dalam keadaan deep coma.
>
F Jika seseorang itu dalam keadaan deep coma dan tidak dirawat ia seterusnya boleh membawa kematian ...
>
> Pada pendapat saya di dalam kes ini simati alami deep coma akibat daripada asphyxia (kelemasan) yang dialami dan seterusnya melalui proses kematian. Proses kematian ini dipercepatkan oleh
G kelemasan akibat asap kebakaran.
>
> Orang yang alami deep coma kita boleh lagi kesan kehidupan pada tubuh badan seseorang itu.

[18] Scrutinising the evidence it was obvious that the deceased
H was in deep coma, caused by strangulation and of having been snuffed by a pillow, and was dying; the smoke merely hastened her death. It is based on the above comprehensive reasons that we prefer SP28's expert opinion to that of SP34 who merely held a 'non-medical' view, derived from a cursory sight of the room and
I the body.

[19] SP12, the chemist who prepared the chemist report (P31) evinced that the DNA profile from the cigarette butt (P23A), the semen from the cotton swab marked J1 and J2 (from rectal and vaginal swab for spermatozoa by SP28) and the blood sample (taken by SP24 at p. 308) in the envelope marked 'O' (p. 314) came from the same source ie, the appellant (p. 83). The profile of the DNA (Deoxyribonucleic Acid) of the two cigarette butts (P23B) did not match each other or even with the deceased's (envelope F) and the appellant's blood (envelope O). We hold the view that even if the other two cigarette butts were recovered and confirmed not to have the DNA profile of the appellant, the outcome would still be the same, as there was sufficient evidence to establish the presence of the appellant in room 321 at the time of the murder. On the other hand if the unrecovered cigarette butts were to hold the appellant's DNA profile they would equally make no difference as it would only have a superfluous effect.

[20] SP19, another chemist testified that after checking room 321 on 4 February 2002, and having analysed the exhibits taken from the scene concluded that the fire had begun from the middle of the bed and the carpet, and then slowly spreading towards the curtains. He opined that the fire was deliberately started with the aid of petrol; there was no evidence of the fire having been started by any electrical fault.

[21] To continue with the chain of evidence, SP5 who was the wife of the appellant was called. Her testimony and explanation made sense of the Helix container (P3) and its nexus with the appellant. According to her, on 3 February 2002 as the appellant's car had run dry, she helped purchase some petrol for him, with the aid of P3. This purchase was confirmed by SP2. She then handed over P3 to the appellant in front of the hotel. She denied any involvement in the murder of the deceased. When recalled, again she categorically denied being at the hotel, by evincing:

> Saya tidak pada bila bila masa pada 3.2.2002 berada di Hotel Panmour Villa.

[22] Her testimony anticipated any accusation of failure by the prosecution to call material witnesses in the light of the fact that not only SP4 knew of the appellant's relationship with the deceased, as the deceased had confided in her, but also the

availability of SP5 as a witness. SP5 admitted that the appellant had a close relationship with the deceased but despite being upset with the deceased SP5 denied of having any intention to kill her.

[23] With the elimination of any suspicion of SP5's possible involvement in the murder at the stage of the prosecution the only suspect left was the appellant; her denial not dented, it also exculpated her of being involved in the murder at the defence stage despite the appellant's accusation of her complicity in the murder. With SP5 not being at the vicinity of the murder, the implication is that only the appellant was in the room with the deceased, and with the opportunity to carry out his murderous act.

[24] This fact of being alone with the deceased and the last person to witness the deceased alive is supported, as clarified earlier, by SP8's testimony. The combined effect of the evidence of the appellant paying the bill and handing over a burnt slot key, and it being the only key to the room, is that the appellant had closed the room's account and thus handing over a supposedly empty room back to the hotel. As he had taken the only key to the room, and leaving the deceased to die in the room, in all logic the appellant must be taken to have been the last person to see the deceased alive.

[25] To close up any loose ends the prosecution called SP6. He testified that on 7 February 2002 at about 12 noon ie, four days after the murder, the appellant had sold three sets of rings, a bracelet, and a pair of earrings to him for RM647. The receipt book which contained the appellant's name was seized from this witness. This witness testified that the appellant had told him that these valuables were that of his girlfriend. All the rings, P7, P8 and P9 were identified by the deceased's sister (SP11). She also testified that P8, which was a diamond ring, was given to the deceased as a wedding present by the previous husband while the other two had been hers for a long time. From the testimony of SP6, a mental picture of the appellant, being the only person in room 321, stripping the deceased of her valuables when in a state of deep coma could be conjured.

Analysis Of Exhibits

[26] At the risk of repeating the evidence, the chain of evidence as to how the petrol was brought into the hotel was explained by the testimony of SP5, when she testified that she handed the Helix container (P3) filled with petrol, to the appellant outside the hotel. This container was identified by her in the course of the proceedings. Who else could have brought the Helix container which contained the petrol to the hotel if not the appellant? The smell of petrol that pervaded the room as testified by SP34, corroborated by the presence of the container, confirmed the prosecution's case that it must have been the petrol contained in P3 that was used to set the room aflame.

[27] It is now accepted by courts that bodily fluid, tissues, semen, saliva etc obtained from the crime scene may be established to connect an accused person to the crime (*Criminal Trial Advocacy for the Defence* by Hisyam Abdullah @ Teh Poh Teik*; PP v. Loo Seng Yip* [2004] 8 CLJ 496; *Hanafi Mat Hassan v. PP* [2006] 3 CLJ 269; [2006] 4 MLJ 134). The profile of the DNA on the cigarette butt (P23A), picked up nearby to room 321, and which matched the DNA of the semen from the cotton swab, confirmed to match that of the appellant, not only confirmed his presence in that room before her death but also of their close relationship. The semen swab established once and for all that their relationship had transcended into a sexual one. In fact we are satisfied that with the appellant's active semen found on the person of the deceased, the additional evidence of the cigarette butt needed to establish his presence in the room at the material time, was unnecessary.

[28] Much court time was taken up to consider whether a cautioned statement (P41) recorded from the appellant was admissible or not; the High Court eventually held that it was voluntarily given by the appellant. It was still held admissible by the High Court and the Court of Appeal despite both courts admitting that there were some errors found on it. Perusing the cautioned statement, when asked whether he wanted to say anything, he had answered no ('tidak') but further down below in the document, his answer went against the earlier reply. Having scrutinised P41, we consider it as an unsafe piece of evidence and hence inadmissible. So, without P41, would the learned judge, and

for that matter the Court of Appeal, still call the defence? The answer is that regardless of the elimination of this cautioned statement as part of the prosecution's evidence the learned judge would still have called the defence. This is in view of his remarks when in clear terms said:

> Sekalipun saya menerima masuk P41 tetapi saya tidaklah bergantung kepadanya. Ia hanya setakat sebagai keterangan sokongan sahaja. Itu pun ia tidaklah bermakna pihak pendakwaan gagal membuktikan kesnya tanpa P41 itu.

[29] It is trite that sufficiency of evidence to establish a *prima facie* case depends on the quality of evidence adduced by the prosecution rather than quantity.

[30] The last question for our consideration is whether his murderous act falls squarely within the provision of murder. Section 300 of the Penal Code reads:

> Except in the cases hereinafter excepted, culpable homicide is murder:
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[31] The evidence relied upon by the prosecution to establish that his acts would fall under any of the sub-clauses, depends very much on the testimony of SP28 and her medical report. Her evidence as adduced showed that prior to the death, there were clear signs of strangulation, possibly with P11 (a towel) and forceful closure of her mouth, physical acts that led to the flow of blood supply to the airway being cut off. SP28 rejected any

suggestion that the deceased was strangled by bare hands. The bruises at the mouth area indicated that it had been forcefully covered by an object like that of a pillow. She had in no uncertain terms said, with or without the smoke the deceased would still have died. The cause of death was attributable to asphyxia with acute pulmonary oedema as a consequence of the suffocation (with fire-related death). The minimal soot lining at the upper airways, which must have come from the smoke, means that she was still alive when the fire was lighted. The smoke merely hastened her death.

[32] As it is difficult for any court to know the mind of an accused person, in order to know of his intention or whether he had knowledge of the outcome of his act, much therefore would depend on inference. Assistance may be sought by a court from the type of weapon used, the excessive force applied, the vital part of the body befallen with injury, and even the eventual outcome of the act of the perpetrator (*R v. Winner* [1995] 79 A Crim R 528). Surely when a gun is brandished during a robbery it may be inferred that the robber is ready to kill when confronted by anyone. Or for that matter murder must have been in the mind of the killer when he stabs a person say, 24 times. At the other extreme end an intention to kill can be evidenced even by a single act particularly on a vital part of the body (*Ranwilage Suren Sanjeewa Fernando v. PP* [1998] 3 SLR(R) 269; *Criminal Law in Malaysia and Singapore* 2nd edn., Stanley Yeo).

[33] For purposes of s. 300(b) having sifted the evidence, we hold the view that the appellant must have known that by strangling the neck of the deceased with the towel or even covering her mouth with a pillow (ingredient of intention of causing such bodily injury), the deceased would suffocate and die (ingredient of likely to cause death of the deceased) (*PP v. Hoo Chee Keong* [1997] 2 CLJ Supp 357; [1997] 4 MLJ 451; *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] 1 MLJ 237).

[34] To fall under s. 300(c) of the Penal Code, likewise certain pre-conditions must be satisfied *viz* the appellant intended to cause bodily injury, the injury did take place, and the inflicted injury was sufficient in the ordinary course of nature to cause death. The intention to cause that bodily injury needless could be read from

A the nature and seriousness of the injury caused. In the current case, the injuries were multiple and inflicted on vital areas with great force, causing the deceased to suffer asphyxia and falling into deep coma inevitably leading to slow death. The act of burning the room (which would get rid of the body, was the *coup* B *de grace*, as death to the deceased was a certainty, let alone disfigurement beyond recognition), was sufficient to establish the required statutory intention.

[35] Could the offence, with the facts as they are, have fallen C under that of s. 299 of the Penal Code? Having perused the evidence the answer has to be in the negative. Even though ss. 299 and 300 of the Penal Code equally contemplate death, the scenario here is that the degree of risk to death is past that of being the likely result but the most probable result, and the D appellant knew death would ensue (the subjective ingredient). Raja Azlan Shah, FCJ (His Royal Highness, the Sultan of Perak) in *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174 in clear terms had said:

> E ... Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder.

(See also *Chung Kum Moey v. PP* [1966] 1 LNS 39; [1967] 1 F MLJ 205 PC; '*Knowledge Of The Degree Of Probability Of Causing Death*' by T Vijayandran [2012] 1 MLJ xxviii)

[36] To conclude, the violent acts of the appellant therefore would fall squarely under sub-clauses (b) or (c) of s. 300 of the Penal Code, in that the prosecution had established that the G appellant had committed culpable homicide amounting to murder. Further, even though the prosecution depended very much on circumstantial evidence, and despite the inadmissibility of P41 ie, the cautioned statement, we likewise find that it had successfully adduced sufficient evidence through witnesses' testimony and H physical evidence (exhibits) collected in the course of the police investigation. The prosecution had established that the appellant had met the deceased at the hotel and had a sexual liaison there, and with the benefit of being the last person to be with her had strangled the deceased. He later started a fire in the room. The I strangulation, asphyxia, and manner of her death were confirmed

by SP28. We therefore conclude that the learned judge had decided correctly that a *prima facie* case had been established thus justifying calling the defence.

Defence Stage

[37] At the defence stage the appellant gave a totally different version to that given by SP4. The latter, at the prosecution's stage had testified that the deceased told her that the appellant had contacted her and wanted to meet up. The appellant on the other hand said it was the deceased who contacted him. The High Court preferred the testimony of SP4 as her story had been left unchallenged at the prosecution's stage. Regardless of who called whom, the inescapable fact was that the appellant came to the hotel, and met the deceased there; culminating with her death at his hands.

[38] The appellant's only serious defence was his allegation that his wife (SP5) had caused the death. He told in some length of SP5 coming to the hotel and causing a heated argument there with him and the deceased. He was supposed to have left the hotel simultaneously with SP5, she returning home and he proceeding to a pharmacy to buy some medicine for his asthma. There he received a call from SP5 to return to room 321. He returned to the room and it was SP5 who opened it; inside the room he saw the deceased on the floor. There was no evidence adduced by the appellant as to how she could have access to that room, in the light of there being only one key for it, and the appellant having just witnessed a supposedly heated argument between SP5 and the deceased. This makes the story by the appellant of SP5 waiting in that room rather far-fetched. He further testified that SP5 told him that the deceased was dead and the body had to be disposed of. He also felt for the pulse but found none. The implication is that it was the wife who strangled the deceased. His wife then left with the Helix container to buy petrol. After her return to the room both of them carried the deceased to the bed followed by SP5 pouring the petrol on the deceased. She then instructed the appellant to light the petrol and thereafter left.

[39] His attempt to blame SP5 came out rather weakly as at the stage of the prosecution he never posed any question that could have implicated her directly to the murder. It is uncontroverted that SP5 had testified that she handed over the petrol to him in a shop called Syarikat Dragon Sound, located outside the hotel, and hence never entered the hotel. At no stage of his evidence did he manage to rebut the evidence of the prosecution that he was the last person to see the deceased alive, in light of the damning evidence of SP8 and SP5, which pinned him down. His defence was further weakened when he failed to stand rigorous probing. Twice (at Jilid 5 pp. 575 and 584) the appellant had admitted that he personally set the room on fire after SP5 had left the room. At p. 575 he said:

> Faridah ambil P3 dan beliau keluar tinggalkan bilik ... Selepas 10 minit saya nyalakan api dengan mancis.

[40] With his admission, it was beyond reasonable doubt that he was the last person to see the deceased alive. Even without his admission, we do not accept his accusation that SP5 was in the room with him prior to the fire, as we accept her evidence that she never entered the hotel. At p. 584 the appellant's story became more untenable as he said:

> Dia juga adalah isteri saya. Saya tidak mahu dia ditangkap. Juga kerana sayalah orangnya yang membakar bilik.

[41] To allege that SP5 killed the deceased, on the premise that he saw the deceased on the floor followed by her supposed statement that the deceased was dead, or said he failed to detect any pulse, simply could not stand the test of SP28's post mortem's finding. By evincing that he checked the pulse of the deceased it must imply that he had some medical knowledge. In light of the fact that the deceased died only after the fire, and by testifying that he found no pulse, he had fallen into his own trap and exposed his capability to lie in court. Once his veracity become doubtful then his evidence must be scrutinised critically (*Mohamed Ali v. PP* [1962] 1 LNS 99; [1962] 1 MLJ 230; *Syed Abu Bakar Ahmad v. PP* [1984] 1 CLJ 80; [1984] 1 CLJ (Rep) 368; [1984] 2 MLJ 19). His admission that he started the fire unwittingly destroyed any semblance of a possible defence.

[42] Having gone through a maximum evaluation exercise of the evidence, and with such overwhelming circumstantial evidence, we find no error in the High Court's finding that the prosecution had established a case beyond reasonable doubt against the appellant (*Balachandran v. PP* [2005] 1 CLJ 85). In a gist the appellant had failed to cast any reasonable doubt on the prosecution's case ie, the burden imposed on him (*Arulpragasan Sandaraju v. PP* [1996] 4 CLJ 597; *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311).

[43] The finding of guilt, the conviction and mandatory sentence of death by hanging are affirmed and we therefore dismiss this appeal. The order of the High Court is affirmed.